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Public Prosecutor v Pham Ti Tuyet Mai (Vietnam)

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(LB)-181–05 OF 2016
ZAWAWI SALLEH, IDRUS HARUN AND KAMARDIN HASHIM JJCA
28 FEBRUARY 2018

C

Criminal Law — Defence — Unsound mind — Respondent was charged under s 302 of the Penal Code — Learned trial judge found that defence of insanity proven and made order under s 348(1) of the Criminal Procedure Code pending order under s 348(2) of the Code — Public prosecutor appealed against decision of learned trial judge — Whether learned trial judge erred in holding that respondent succeeded in establishing that she was in such a state of mind as to be entitled to the benefit of s 84 of the Penal Code — Criminal Procedure Code s 348(2) — Penal Code ss 84 & 302

D

This was the public prosecutor's appeal against the decision of the High Court judge who had acquitted the respondent of a charge under s 302 of the Penal Code ('the PC'), but having found the respondent committed the act which was the subject matter of the charge, ordered the respondent be kept in safe custody at Hospital Bahagia, Tanjung Rambutan, Perak under s 348(1) of the Criminal Procedure Code ('the CPC'), pending the order of His Royal Highness the Sultan of Selangor under s 348(2) of the CPC ('the order'). The High Court initially acquitted the respondent at the end of the prosecution's case on the ground of mental disorder and on appeal, the Court of Appeal reversed the said order and ordered that defence be called. The respondent relied on the defence of insanity and a medical doctor ('SD2') was called to support the respondent's case. The learned trial judge found that the defence of insanity was proven, hence, the order. The main issue arose in the present appeal was whether the learned trial judge erred in holding that the respondent had succeeded in establishing that she was in such a state of mind as to be entitled to the benefit of s 84 of the PC.

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Held, dismissing the appeal:

(1) When a plea of insanity is set up, the crucial point of time for ascertaining the state of mind of the accused is at the time when the offence was committed which can only be established from the circumstances which preceded, attended and followed the crime. In order to ascertain the mental condition at the time of the act, it is permissible to receive evidence of his mental condition during a reasonable period before and after the act (see paras 22–23).

I

(2) In the present appeal, the evidence on record supported the findings of the learned trial judge that the respondent was suffering from unsoundness of mind at the time when she did the act and she was incapable of knowing the nature of the act or she did not know what she was doing was either wrong or contrary to law. There was no direct evidence to show the respondent's mental state of mind at the exact moment the crime was committed, however this was not fatal to the finding that she was insane. Her insanity may still be shown by circumstance immediately after the incident. The learned trial judge took into consideration the evidence of SD2 who categorically testified that at the time of the commission of the offence, the respondent was in the state of unsoundness of mind and she did not know that what she was doing was contrary to law. In respect of this, the learned trial judge found that the evidence of SD2 was credible and inherently probable (see paras 24–25 & 27–28).

(3) The court noted that at the very first opportunity, the respondent already raised the defence of insanity and remained steadfast that she was deprived of intelligence at the time of commission of the offence. Therefore, the respondent's defence of insanity was not a mere afterthought (see para 30).

(4) Individuals who voluntarily take substance leading to deprivation of relevant capacities should be held responsible for their actions. However, mental illness which are the direct effect of psychoactive substances such as ecstasy are considered as a basis for insanity defence under the law (see para 32).

(5) The court was satisfied that the learned trial judge had made the correct decision based on the applicable law and the evidence adduced before him in acquitting the respondent on the ground of insanity, and in making the order under s 348(1) of the CPC (see para 34).

[Bahasa Malaysia summary

Ini merupakan rayuan pendakwa raya terhadap keputusan hakim Mahkamah Tinggi yang telah membebaskan responden atas satu pertuduhan di bawah s 302 Kanun Keseksaan ('KK'), akan tetapi setalah mendapati responden telah melakukan perkara yang merupakan asas pertuduhan, memerintahkan responden diletakkan di bawah jagaan Hospital Bahagian, Tanjung Rambutan, Perak di bawah s 348(1) Kanun Tatacara Jenayah ('KTJ'), menunggu untuk perintah Yang Amat Mulia Sultan Selangor di bawah s 348(2) KTJ ('perintah tersebut'). Mahkamah Tinggi pada mulanya telah membebaskan responden di akhir kes pendakwaan atas alasan gangguan mental dan sewaktu rayuan, mahkamah rayuan mengetepikan perintah tersebut dan memerintahkan agar pembelaan dipanggil. Responden bergantung kepada pembelaan tak siuman dan doktor perubatan ('SD2') telah dipanggil untuk menyokong kes

responden. Hakim bicara terpelajar mendapati bahawa pembelaan tak siuman telah dibuktikan dan memberikan perintah tersebut. Isu utama yang berbangkit dalam rayuan ini adalah sama ada hakim terkhilaf dalam memutuskan bahawa responden telah berjaya dalam membuktikan bahawa dia dalam keadaan minda yang sedemikian rupa yang layak untuk bergantung kepada s 84 KK.

Diputuskan, mengetepikan rayuan:

(1) Apabila satu rayuan tak siuman di mulakan, waktu yang penting untuk menentukan keadaan minda tertuduh diwaktu tersebut adalah semasa kesalahan dilakukan yang hanya boleh dibuktikan berdasarkan keadaan sebelum, semasa dan selepas kesalahan. Untuk menentukan keadaan minda pada waktu pelakuan tersebut, ianya dibenarkan untuk menerima keterangan keadaan mentalnya untuk tempoh munasabah sebelum dan selepas perlakuan tersebut (lihat perenggan 22–23).

(2) Dalam rayuan ini, keterangan menyokong dapatan hakim bicara terpelajar dan responden sedang tidak siuman sewaktu masa yang mana dia melakukan perkara tersebut dan dia tidak mampu untuk mengetahui sifat perlakuan tersebut atau dia tidak mengetahui apa yang dilakukan adalah sama ada salah ataupun bertentangan dengan undang-undang. Tiada keterangan langsung untuk menunjukan keadaan minda pada waktu kesalahan dilakukan, namun ini adalah tidak mengganggu dapatan yang dia tidak siuman. Ketidaksiumannya mungkin masih kelihatan dari keadaan sejurus selepas kejadian tersebut. Hakim bicara terpelajar mengambil kira keterangan SD2 yang secara jelas memberi keterangan bahawa pada waktu kesalahan tersebut dilakukan, responden berada dalam keadaan tak siuman dan dia tidak mengetahui apa yang dia lakukan adalah bertentangan dengan undang-undang. Berkaitan dengan ini, hakim bicara terpelajar mendapati bahawa keterangan SD2 adalah kredibel dan berkebarangkalian (lihat perenggan 24–25 & 27–28).

(3) Mahkamah mengambil maklum bahawa waktu yang paling awal, responden telahpun menimbulkan pembelaan tak siuman dan kekal bahawa dia telah kurang waras pada waktu kesalahan dilakukan. Oleh itu pembelaan tak siuman responden bukanlah satu perkara yang difikirkan kemudian (lihat perenggan 30).

(4) Individu yang dengan sendirinya mengambil bahan yang membawa kepada kehilangan kebolehan yang relevan perlu dipertanggungjawabkan dengan tindakan mereka. Namun, penyakit mental yang merupakan kesan langsung bahan psikoaktif seperti *ecstasy* dianggap sebagai asas untuk pembelaan tak siuman di bawah undang-undang (lihat perenggan 32).

(5) Mahkamah berpuas hati bahawa hakim bicara telah membuat keputusan

yang tepat berdasarkan undang-undang terpakai dan keterangan yang dikemukakan dihadapannya dalam membebaskan responden atas sebab ketidaksuaman, dan dalam membuat perintah di bawah s 348(1) KTJ (lihat perenggan 34).]

Notes

For a case on unsound mind, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) para 1210.

Cases referred to

Baharom v PP [1960] 1 MLJ 249; [1960] 1 LNS 9, CA (refd)
Goh Yoke v PP [1970] 1 MLJ 63, FC (refd)
John a/k Nyumbei v PP [2007] 7 MLJ 206; [2007] 2 CLJ 509, CA (refd)
Juraimi bin Husin v Public Prosecutor [1998] 1 MLJ 537, CA (refd)
PP v Arokiasamy a/l Alphonso [2012] 1 MLJ 165; [2012] 6 CLJ 117, CA (refd)
PP v Misbah bin Saat [1997] 3 MLJ 495, HC (refd)
PP v Mohd Nor Riza bin Mat Tahar [2011] 2 MLJ 21; [2009] 4 CLJ 691, FC (refd)
Rajagopal v PP [1977] 1 MLJ 6, FC (refd)

Legislation referred to

Criminal Procedure Code s 348(1), (2)
Evidence Act 1950 s 105
Penal Code ss 84, 85(ii)(a), 302

Appeal from: Criminal Trial No 45B-37–08 of 2014 (High Court, Shah Alam)

Iswa bt Tonie (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Muhammad Rafique bin Rashid Ali (Law Practice of Rafique) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] Before the court is an appeal by the public prosecutor ('PP') assailing the decision of the High Court at Shah Alam dated 29 April 2016 which acquitted the respondent of a charge under s 302 of the Penal Code ('the PC'), but, having found the respondent committed the act which was the subject-matter of the charge, ordered the respondent to be kept in safe custody at Hospital Bahagia, Tanjung Rambutan, Perak, pending the order of His Royal Highness the Sultan of Selangor under s 348(2) of the Criminal Procedure Code ('the CPC').

THE CHARGE

[2] The charge against the respondent reads:

> Bahawa kamu pada 02/08/2013 jam lebih kurang 11.00 pagi di alamat No 23, Jalan Pahlawan 11/3, Bandar Mahkota Cheras, Kajang, di dalam Daerah Hulu Langat, dalam Negeri Selangor, dengan niat telah melakukan kesalahan bunuh sehingga menyebabkan kematian Huynh Thi Y, No Passport: B7658079, warganegara Vietnam, dengan menggunakan senjata pisau. Oleh yang demikian kamu telah melakukan kesalahan yang dihukum di bawah seksyen 302 Kanun Keseksaan.

FACTS OF THE CASE

[3] The relevant part of the evidence led for the prosecution in the High Court as summarised by the learned trial judge and recounted by learned deputy public prosecutor ('DPP') in the appellant's written submission is as follows:

(a) the respondent is a Vietnam national working in Malaysia as a waitress at a night club karaoke. She stayed with six others in a double storey house bearing address as in the charge. Her housemates are Ha Ngoc Lich ('SP1'), Wong Zey Hong, Dang Thi Thu Ha, Tron Diem My, Nguyen Thi Son and Huynh Thi Y ('the deceased');

(b) on the fateful day, SP1, after having breakfast, went up to her room to rest. On the way up to her room, SP1 saw the deceased was sleeping below the staircase. At that material time, SP1 saw the respondent on her way down from her room situated at the upper floor of the house;

(c) After five minutes, SP1 heard the scream from the deceased who uttered words: 'why do you want to kill me?';

(d) SP1 went to look what had actually happened. She saw the respondent was holding two knives in each hand. One knife was used to cut the deceased's left neck and the other knife was used to stab at the back of the deceased repeatedly;

(e) after seeing that, SP1 was in state of fear and returned to her room to inform the incident to Tran Diem May ('Tran'). Tran immediately called Michael Wong Ho Sang ('Michael') for help. Michael came to the house with his brother after about ten minutes. SP1 went down to open the door for them. While SP1 was walking past the deceased's body, SP1 saw the accused was sitting beside the deceased's body which was motionless. SP1 also heard the respondent asked the deceased why was the deceased sleeping. The respondent also laughed at the deceased;

(f) after a while, the respondent became very quiet and remained at same place but without holding any weapon;

(g) Michael's brother-in-law carried the deceased to a car. All of them, including other residents of the house, went together to Hospital Sg Long, Kajang and left the respondent alone in the house without locking the doors of the house;

(h) the deceased was pronounced dead after 30 minutes of her arrival at the Sg Long Hospital;

(i) at 2.28pm, ASP Chay HuYan ('SP2') (investigating officer) was informed about the deceased's death. SP2 together with one ASP Mobin and photographer rushed to the Hospital Sg Long; and

(j) the pathologist, Dr Abdul Karim bin Tajudin, conducted the post-mortem examination on the body of the deceased. He concluded that she died mainly due to the cut on her neck. According to the pathologist, although there were several stab wounds on the deceased's body, the main cause of death was the cut or incised wound of her neck which had severed her carotid artery (see post-mortem report (exh P37)).

FINDING AT THE END OF THE PROSECUTION'S CASE

[4] At the end of the prosecution's case, the learned trial judge ordered the respondent to be acquitted without her defence being called on the ground of mental disorder.

[5] Being dissatisfied with the impugned order, the PP appealed to the Court of Appeal. The Court of Appeal (Mohtarudin Baki, Prasad Sandhosam Abraham and Abdul Karim Abdul Jalil JJCA) ordered that the defence of the appellant be called in accordance with the procedures specified in law.

[6] Accordingly, the learned trial judge called the respondent to enter her defence.

VERSION OF THE DEFENCE

[7] The respondent elected to give written unsworn statement from the dock. The respondent sets up insanity as her defence. Her version of the facts is as follows:

> Nama saya Pham Ti Thuyet Mai, saya warganegara Vietnam. Umur saya 32 tahun.
>
> Saya datang ke Malaysia tahun 2012. Saya dulu bekerja sebagai pelayan di pusat hiburan.
>
> Dulu saya banyak minum arak dan ambil dadah. Saya ambil pil 'ecstasy'. Saya selalu sakit dan rasa takut, perasaan saya selalu terganggu. Saya ada masa rasa sangat suka dan ada masa rasa sangat sedih dan takut.

Saya selalu rasa macam ada orang mahu membunuh saya dan saya dalam bahaya. Saya tak boleh tahan, dan saya balik ke Vietnam untuk satu bulan bagi rawatan tradisional.

Selepas satu bulan, saya rasa saya boleh balik ke Malaysia dan kerja semula. Mula-mula saya tak sakit, tapi lama-lama, saya rasa macam gangguan emosi lagi, saya perasaan bahawa saya macam dengar ada bunyi dalam kepala saya, saya selalu nangis dan tak mahu campur kawan-kawan lain.

Sekali lagi, saya ambil pil ecstasy setiap malam, saya juga tak boleh tidur malam. Saya selalu bangun malam, jalan-jalan dalam rumah saya. Saya selalu mimpi macam-maam perkara yang menakutkan.

Pada hari saya bunuh Huynh Thi Y, saya hanya boleh ingat, saya bangun tidur, saya dan Huynh Thi Y sudah ubah jadi hantu.

Saya dengar macam-macam suara dalam kepala saya dan saya tengok, saya mesti mahu bunuh Huynh Thi Y supaya itu hantu boleh mati, dan saya perlu bunuh Huynh Thi Y untuk bukti sama ada Huynh betul-betul sudah jadi hantu.

Saya masuk dapur untuk ambil dua pisau, tapi saya tidak mahu bunuh, saya jalan-jalan dalam ruang dapur dan ruang tamu.

Saya sangat runsing saya dengar macam-macam suara dan lihat macam-macam orang. Saya takut, saya ada naik tangga mahu masuk bilik, tapi saya tak tahu kenapa, saya tak masuk bilik, saya turun balik, saya terus pergi dekat Huynh Thi Y dan saya tikam dia.

Itu sahaja saya ingat, tapi saya selepas itu ada panggil dia supaya bangun dari tidur. Saya tengok banyak darah. Saya duduk dengan Huynh Thi Y, saya panggil dia lagi.

Saya ada cakap dengan kawan lain, tolong panggil Huynh Thi Y suruh bangun mahu keluar, tapi mereka lari.

Saya sehingga beberapa hari, saya tak ingat saya sudah tikam mati Huynh Thi Y.

Saya jerit, nangis bila tahu dia sudah mati. Saya kawan baik dia, kami kerja di tempat yang sama dan tidur bilik yang sama. Sehingga hari ini, saya sedih dan keliru apa yang telah berlaku.

Itu sahaja saya mahu cakap.

[8] The defence called a medical doctor, Dr Hjh Robaiah bt Mohd Salleh ('SD2') to support the respondent's case.

FINDINGS AT THE CLOSE OF DEFENCE'S CASE

[9] The learned trial judge concluded that the respondent had successfully put forth the defence of insanity as the mental capacity of the respondent during the commission of the offence was affected by the consumption of ecstasy pills. Consequently, the respondent was incapable of knowing what she

was doing was either wrong or contrary to the law during the commission of the offence.

[10] The learned trial judge found that the reasoning given by SD2 who had examined the respondent to be credible and inherently probable.

[11] As we have alluded earlier, the learned trial Judge acquitted the respondent on the ground that although she had committed the act, she was incapable of knowing the nature of the act to be wrong or contrary to the law by reason of unsoundness of mind.

[12] The learned trial judge then ordered the respondent to be kept in safe custody at Hospital Bahagia, Tanjung Rambutan, Perak under s 348(1) of the CPC pending the order to be made by the Ruler under s 348(2) of the CPC.

THE APPEAL

[13] Learned DPP submitted that the evidence adduced by the defence is insufficient to establish her claim of insanity at the time she killed the deceased.

[14] Learned DPP posited that since insanity is a condition of the mind, it is not susceptible of the usual means of proof. As no man can know what is going on in the mind of another, the state or condition of a person's mind can only be measured and judged by his or her behaviour. Thus, the vagaries of the mind can only be known by means of which we read the thoughts, motives, and emotions of a person, and then determine whether the acts conform to the practice of people of sound mind.

[15] Learned DPP took us through the following facts in support of her contention that the respondent was not completely of unsound mind at the time of the commission of the offence:

(a) the exhibits such as the knife (photo as in exh P39(28)) used to stab the deceased's backbone which was found in a bag (photo as in exh P39(27)) near the entrance (photos as in exhs P39(25) and P39(26)) clearly showed that the respondent was deliberately trying to hide the knife. The forensic team also found a black plastic bag at the living room (photo as in exh P39(29)) and inside the bag there were orange mattress, black/brown blanket, blue and red/green pillows tainted with the deceased's DNA. A reasonable inference that could made was that the respondent had attempted to eliminate evidence;

(b) in exh P38 (*laporan pemeriksaan tempat kejadian*) under the part '19. Ulasan', there was a mop soaked inside a pail in the kitchen. It could be inferred that the respondent had cleaned that floor as only little blood

trace was found at the floor of the living room. This showed that the respondent was trying to destroy the evidence remained at the scene; and

(c) there were six knives hidden under mattress (photos in exh P39(43)–(53) in PW1's room. PW1 had explained that she did not keep the knives and had no knowledge about the existence of the knives in her room. After analysis, four of the six knives were found to have been tainted with the deceased's DNA profiles. The act of the respondent in hiding the weapons used to kill the deceased showed that she was aware of what she was doing at the time of the commission of the offence.

[16] Learned DPP further contended that establishing the insanity of an accused often requires opinion testimony which may be given by a witness who is intimately acquainted with the accused; has rational basis to conclude that the accused was insane based on his own perception; or is qualified expert, such as a psychiatrist.

[17] In this connection, SD2 who examined the respondent testified as follows at pp 22–23, *RR*, Vol 2:

TPR: Saya rujuk kepada report doktor, mukasurat 3 tadi. Dalam kesimpulan ini, setuju doktor nyatakan di sini, Cik Pham dia tidak menghadapi penyakit mental yang serius?

SD2: Saya setuju bahawa saya menulis ayat ini. Saya setuju.

TPR: Dan ini adalah hasil daripada pemerhatian dan juga doktor punya kajian terhadap pesakit sepanjang pesakit berada di bawah tahanan Hospital Bahagia, setuju doktor?

SD2: Saya setuju bahawa saya telah menulis ayat ini tapi di sini saya mungkin terangkan. Saya perlu terangkan, Yang Arif bahawa di dalam *psychology world*, language orang-orang psikiatri ini apabila kita cakap penyakit mental yang serius ini kita maksud tiga penyakit yang saya cakap tadi itu.

Mah: Itu maksudnya.

SD2: Skizofrenia, bipolar mood disorder and depression. So, this was the message yang di tulis di sini. Iaitu bukan tiga penyakit mental yang serius.

Mah: Makanya tidak menghadapi penyakit mental yang serius dalam laporan kita bermaksud bukan tiga penyakit tadi?

SD2: Kita bukan cerita pasal tahap. We're not talking about tahap serius tak serius, kan? Yang tadi itu cerita mengenai tahap.

Mah: Yang saya faham tahap disoal tadi.

SD2: Itu semua tahap.

Mah: Yang dimaksudkan di sini bukan tahap. Bukan tiga tadi?

SD2: Bukan.

[18] Learned DPP submitted based on the expert opinion above, the respondent did not suffered serious/severe mental illness that entitled her to rely on s 84 of the PC. According to learned DPP, to be exempted under this section, mere proof of mental illness alone is not enough. It should be clearly proved that:

(a) the respondent was of unsound mind;

(b) the respondent was of unsound mind at the time of the commission of the offence; and

(c) the respondent by reason of insanity, was incapable of knowing the act and that what she was doing was wrong and contrary to the law. It is not sufficient to prove merely the presence of mental derangement or psychotic illness. The respondent must prove her cognitive faculties were so impaired that she was deprived of understanding the nature of the act or distinguish right from wrong: 'wrong' here means moral wrong and not legal wrong.

[19] Learned DPP further contended that this section does not confer immunity from criminal liability in every case of insanity of the accused. Coupled with the insanity of the accused, there must be the additional fact that at the time of the commission of the act, she is in consequence of the insanity, is incapable of knowing the nature of the act or that she is doing what is either wrong or contrary to law. It is settled principle that 'every person is sane unless contrary is proved' and the onus of proving insanity is upon who pleads it as a defence and is based on a balance of probabilities (see *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206; [2007] 2 CLJ 509; *Public Prosecutor v Arokiasamy a/l Alphonso* [2012] 1 MLJ 165; [2012] 6 CLJ 117; *Juraimi bin Husin v Public Prosecutor* [1998] 1 MLJ 537; *Baharom v Public Prosecutor* [1960] 1 MLJ 249; [1960] 1 LNS 9; *Public Prosecutor v Misbah bin Saat* [1997] 3 MLJ 495; *Rajagopal v Public Prosecutor* [1977] 1 MLJ 6; *Goh Yoke v Public Prosecutor* [1970] 1 MLJ 63).

OUR FINDINGS

[20] The central issue in this instant appeal is whether the learned trial judge erred in holding that the respondent had succeeded in establishing that she was in such a state of mind as to be entitled to the benefit of s 84 of the PC.

[21] According to s 105 of the Evidence Act 1950, the burden of proof in a case where insanity is set up as a defence is upon the accused person. However,

this requirement of proof is not heavy as on the prosecution to prove the offence and is based on a balance of probabilities.

[22] When a plea of insanity is set up, the crucial point of time for ascertaining the state of mind of the accused is at the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of s 84 of the PC can only be established from the circumstances which preceded, attended and followed the crime.

[23] We agreed with submission of learned DPP that the evidence of the mental condition of the accused during a reasonable period before and after the commission of the offence is relevant. Thus, in order to ascertain a person's mental condition at the time of the act, it is permissible to receive evidence of his mental condition during a reasonable period before and after the act. A person's mind can only be fathomed by external acts, thereby his or her thoughts, motives and emotions may be evaluated to determine whether his or her external acts conform to those people of sound mind.

[24] In this instant appeal, the evidence on record supports the findings of the learned trial judge that the respondent was suffering from unsoundness of mind at the time when she did the act and she was incapable of knowing the nature of the act or she did not know that what she was doing was either wrong or its was contrary to law.

[25] It is true that there is no direct evidence to show the respondent's mental state of mind at the exact moment the crime was committed. This, however, is not fatal to the finding that she was insane. Her insanity may still be shown by circumstance immediately after the incident.

[26] SP1, a witness for the prosecution, testified regarding the respondent's behaviour and conduct after the incident, to wit:

> During examination-in-chief
>
> S: Masa kamu turun, kamu tengok ada simati dengan orang yang mati itu dengan OKT di bawah tangga, keadaannya macam mana? Berapa jarak ... kedudukannya macam mana masa itu?
>
> J: Yang mati itu tidak boleh cakap apa-apa. Masa itu yang mati itu tidak boleh cakap apa-apa. *Masa itu OKT pun duduk sebelah yang mati itu dan cakap, kamu tidur ke, kenapa tak bangun. Lepas itu OKT pun sama gelak juga selepas itu. Dia laugh.*
>
> Peguam: Gelak.
>
> Mah: Gelak?
>
> J: Ya Yang Arif.

Mah: Ketawa?

J: *Dia ketawa yang mati itu*.

Mah: OKT ketawa kepada si mati?

J: Ya Yang Arif.

S: Masa itu ada dia pegang apa-apa senjata?

J: Tangan OKT tidak pegang pisau lagi. Dia letak pisau dekat sebelah dia.

(See pp 52 and 53 *RR*, Vol 5A).

During cross-examination

S: Ada tak sepanjang kamu serumah dengan dia kamu lihat perangai dia yang pelik?

Mah: Yang pelik?

S: Yang pelik yang luar biasa seperti bercakap seorang nampak hantu.

J: Ya, saya nampak juga.

S: Saya nampak apa? Apa yang nampak tu?

J: *Saya nampak OKT duduk blur selepas itu*.

S: Duduk blur sahaja?

J: *Ya duduk blur sahaja*.

Mah: Duduk apa?

S: Duduk blur, Dia duduk blur. Lepas itu?

J: *Lepas itu dia gelak juga*.

S: Ketawa.

Mah: Dia ketawa?

J: Ya Yang Arif.

Mah: Ketawa sendiri, seorang?

J: Sendiri, Yang Arif.

Mah: Ketawa seorang diri?

J: Ya Yang Arif.

S: Selain itu ada tak OKT ada mengadu yang dia nampak hantu ataupun dengar suara?

J: *Saya nampak juga ada masa itu OKT shouting*.

S: Menjerit?

J: Ya, menjerit.

(See pp 75, 76 and 77 AP, Vol 5A).

S: Dan setuju dengan saya, perangai dia memang pelik yang kamu lihat selepas itu. Dia bercakap seorang, bercakap dengan si mati, dia ketawa kepada si mati, setuju tak pelik perangainya itu?

J: Ya, ada.

(See p 79 AP, Vol 5A). (Emphasis added.)

[27] Further, the expert opinion of SD2 (Dr Hjh Robaiah bt Mohd Salleh) may also be taken into account. SD2 categorically testified that at the time of the commission of the offence the respondent was in the state of unsoundness and she did not know that what she was doing was contrary to law. In her testimony, SD2 stated as follows:

During examination-in-chief

S: Terima kasih doktor. Boleh doktor saya merujuk doktor kepada beberapa ... D133 tersebut, mukasurat 3. Di bahagian kesimpulan, doktor. Doktor bacakan kepada mahkamah kesimpulan yang dibuat oleh doktor terhadap pemerhatian Cik Pham.

J: Kesimpulan yang saya buat adalah setelah meneliti segala maklumat serta daripada pemeriksaan dan pemerhatian oleh saya, pegawai perubatan dan anggota-anggota paramedic, saya berpendapat bahawa Cik Pham Ti Tuyet Mai tidak menghidap penyakit mental yang serius. *Walau bagaimanapun, saya juga berpendapat bahawa semasa kejadian beliau berada di dalam keadaan tidak waras dan tidak sedar bahawa perbuatannya adalah salah di sisi undang-undang*. Ini adalah disebabkan oleh gejala-gejala psikosis yang disebabkan oleh pengambilan dadah jenis ecstasy yang berterusan dan di masa saya menulis laporan itu keadaan mental beliau adalah stabil dan beliau layak untuk dihadapkan ke mahkamah untuk dibicarakan dan boleh membela diri. Itu sahaja, Yang Arif.

S: Doktor sangat pakar dalam perkara ini saya ingin bertanyakan satu soalan luar daripada report doktor. Adakah pengambilan ecstasy ini boleh menimbulkan gejala-gejala kesihatan seperti ... of sleep, mood changes, interruption in feeding and sexual behaviour, psychotic disorder including depression, anxiety, imposivity, obsessive composite disorder dan kemungkinan major depression and schizophrenia. Adakah perkara-perkara ini boleh terjadi?

J: Apa yang disenaraikan tadi, Yang Arif adalah benar jika pengambilan itu berterusan.

(See pp 8 and 9, AP Vol 2).

S: Adakah doktor sahkan sepertimana doktor beritahu mahkamah tadi perkara-perkara yang boleh berlaku jika seseorang mengambil ecstasy berpanjangan? Perkara yang sama telah diceritakan dalam artikel tersebut.

Mah: Let the doctor read first whether she agree or not.

S: Itu soalan saya.

J: Yang Arif, apa yang ditulis di sini adalah kemungkinan menghidap gejala-gejala tersebut, bukan semua gejala-gejala tersebut.

Mah: Jadi doktor setuju?

J: Saya setuju Yang Arif.

(See pp 10 and 11 AP, Vol 2).

During cross-examination

S: Macam mana tu?

J: Maknanya sebab seorang yang piskotik disebabkan ... orang yang psikotik sakit mental biasa dan orang yang psikotik disebabkan drug induce, dia symptom ada dua biasa ada iaitu *halusinasi dan delusi dan disorganize behaviour*. Dari dalam drug induce psikosis itu, dia punya disorganise behaviour lebih daripada general pesakit mental.

(See p 15 AP, Vol 2). (Emphasis added.)

[28] The learned trial judge has proffered his reasons as to why he accepted the expert evidence of SD2. His Lordship found that the evidence of SD2 was credible and inherently probable. The learned trial judge said at pp 28–29, AP Vol 1:

Credibility of SD2

33. The Prosecution had attempted to challenge the evidences given by SD2 and discredit her expertise. However, the Prosecution did not make any application to provide other expert witness to counter this before examination of SD2. Neither did the Prosecution call any expert evidence to rebut the evidence of SD2 at this trial.

34. In my considered view, this Court is entitled to accept the opinion of SD2 and D133 on its face value unless the prosecution had called another expert evidence in rebuttal to contradict her.

35. Essentially, the expert opinion given in evidence at this trial is a matter of fact. In this aspect, the Court could ask the relevant questions to SD2 for clarification to enable SD2 to provide cogent reason for her conclusion (see *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61). This Court is not bound by the expert opinion and could for its own opinion to form its findings.

36. The Prosecution also submitted that the time of examination conducted by SD2 was too long after the incident resulting the findings might be inaccurate. Be as it may, this Court would reach the same findings because the Court actually made evaluation basis by scrutinizing all the available evidences meticulously

and not based on medical opinion solely.

37. On the issue of delay of the doctor in examining the Accused, in my opinion, this is a strong disinclination to criticise the accuracy of the medical examination due to police's negligence. Indeed, the investigating Officer has a duty to uphold fairness towards the Accused throughout the investigation process. Hence following the arrest and statement recording, the Investigating Officer should have sent the Accused immediately to the medical doctors for examination. His failure should not be used by the Prosecution to complaint and used for the Prosecution's advantage.

38. Therefore, after reading the facts together with assistance of SD2's opinion, this Court found that reasoning given by SD2 is accepted as being credible and inherently probable.

[29] Concerning the submission of learned DPP that the respondent was in fact capable of knowing what she was doing was either wrong or contrary to the law at the time of the commission of the offence since the respondent had tried to cover her wrongdoing by eliminating the evidence at the scene, the learned trial judge observed at pp 30–31 as follows:

40. On the issue that the Accused had hidden the knife (photo as in P39(28)) in the bag (photo as in P39(27)) near the entrance (photos as in P39(25) and P39(26)) and the mattress, blanket, pillows in the black plastic bag at the living room (photo as in P39(29)), the Court found all these were purely assumptions made by the Prosecution without any evidence.

41. Furthermore, the mop inside the pail was not sufficient to establish that it was the Accused had used it to clean the scene since there were blood traces still remained there. The scene could have been totally cleaned if the culprit intended to wash away the evidence since there was evidence that the Accused was left alone when everybody had left for the hospital.

42. The averment about six knives were hidden under mattress (photos in P39(43)–(53)) in PW1's room was unsustainable since the Prosecution had not tendered proof to confirm that it was the conduct of the Accused.

43. I am mindful, if the above-mentioned acts had actually been carried out by the Accused, it was the state of mind of the Accused after the incident and not during the time of the commission of the offence. Therefore, it is still relevant for the purpose of determining what was the state of mind of the accused at the time of the commission of the offence.

44. More importantly, this Court had taken into account that the Accused could have fled away from the scene since she was left alone in the house after the incident if the Accused knew what she was doing was contrary to law. No one can stop or hinder the Accused from running away since she was left alone in the house at that significant time.

45. Pursuant to the above, it can be readily decided that the Accused truly did not understand the nature of her act at the time of killing the deceased.

[30] This court notes that at the very first opportunity, the respondent already raised the defence of insanity and remained steadfast that she was deprived of intelligence at the time of commission of the offence. Therefore, the respondent's defence of insanity was not a mere afterthought.

[31] That, however, it is not the end of the matter. Learned DPP submitted that it was clear from the evidence adduced that it was the respondent who voluntarily consumed the ecstasy pills in large quantity. Self-induced ecstasy pills is not a defence under the law.

[32] It is trite that the absence of the legally relevant capacities due to voluntary intoxication from alcohol or drugs is not considered as basis for insanity defence as stated in s 85(ii)(a) of the PC (see *Public Prosecutor v Mohd Nor Riza bin Mat Tahar* [2011] 2 MLJ 21; [2009] 4 CLJ 691). It can only be considered as a basis for a defence when substance had been administered to the accused involuntarily. The underlying moral and legal principle for this exception is the premise that an insane should only be excused from punishment because of his or her lack of control over the presence of the mental illness and because the mental illness was brought on due to external circumstances. Thus, individuals who 'voluntarily' take substance leading to the deprivation of relevant capacities should be held responsible for their actions. However, mental illness which are the direct effect of psychoactive substances such as ecstasy are considered as a basis for insanity defence under the law.

[33] Before departing with this instant appeal, we must emphasise that the granting of absolution of criminal liability on the basis of insanity should be done with utmost care and circumspection as the court must keep its guard against murderers seeking to escape punishment through a plea of insanity. The case at hand, however, does not indicate that the defence of insanity was merely used as a convenient tool to evade culpability.

CONCLUSION

[34] We are satisfied that the learned trial judge had made the correct decision based on the applicable law and the evidence adduced before him in acquitting the respondent on the ground of insanity, and in making the order under s 348(1) of the CPC.

[35] Consequently, the PP's appeal is dismissed and the decision of the learned trial judge is affirmed. So ordered.

Appeal dismissed.

Reported by Izzat Fauzan